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IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1979

No. 79-1331

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF SAFETY
and
COLONEL HAROLD E. KNOWLTON, DIRECTOR
DIVISION OF STATE POLICE, Petitioners

v.

DONALD W. CARLSON, Respondent

PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
FIRST CIRCUIT

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February 26, 1980

IN THE
SUPREME COURT OF THE
UNITED STATES

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FIRST CIRCUIT

The Petitioners are the New Hampshire Department of Safety and Colonel Harold E. Knowlton, Director of the Division of State Police. Petitioners respectfully pray that

a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on November 30, 1979.

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit appears at 609 F.2d 1024(1979), and is reproduced in the Appendix hereto at page A-1. The opinion of the United States District Court for the District of New Hampshire is reproduced in the Appendix at page A-8.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on November 30, 1979. This

petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to the provisions of 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether a trooper with the New Hampshire State Police, hired subject to 24 hour duty and troop reassignment at the discretion of the Director of State Police, was denied an "incident or advantage" of his employment in violation of §2021(b)(3) of the Veterans Readjustment Assistance Act, 38 U.S.C. §§2021-2026, when he was reassigned to a different troop upon his return from active duty training with the United States Air Force Reserve.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

38 U.S.C. §2021. The text of this statute is lengthy and is therefore set forth in the Appendix at page A-18.

38 U.S.C. §2024. The text of this statute is lengthy and is therefore set forth in the Appendix at page A-25.

Rules and Regulations of the New Hampshire State Police:

3.5 Assignments

Employees will be assigned to such Bureau, Troop, or Unit as the Director may order, or to any other duty he may deem for the good of the service.

3.5.1 Police employees are required to reside in the location of their duty assignment as designated by

the Director and are further required to have telephones with published numbers in the place where they reside. Employees shall report changes in their address and/or telephone number to their Commanding Officer within twenty-four hours of the change.

3.5.2 Hours of duty assignments within a Troop, Bureau, or Unit may be made by the Commanding Officer or the Director.

4.1 Obligations

4.1.1 Service in the Division of State Police requires police employees to keep themselves physically fit. Police employees must keep themselves in condition for duty twenty-four hours per day, except when on sick leave, annual leave, or day off. When called

for an assignment while off duty, an employee shall promptly report for the assignment.

4.1.2 No employee shall absent himself from duty, his patrol or assignment, or leave the State on police business without permission of his Commanding Officer.

4.1.3 Employees shall report for duty at the time and place required by assignment or orders and shall be physically and mentally fit, and properly attired. Members not appearing for duty, including hearings, court appearances, or other designated assignments on time are in violation of this section.

4.1.4 Any employee who knows he will be unable to report for duty due to illness or injury shall immediately

notify his commanding officer, advising him of the nature of the illness or injury, where he will be recuperating and the expected date of return to duty.

4.1.5 Employees shall not feign illness or injury, falsely report themselves ill or injured, or otherwise deceive or attempt to deceive the Department as to the condition of their health.

4.1.6 An employee injured while on duty shall report such injury to his immediate supervisor or commanding officer as soon as possible and shall comply with provisions of Workman's Compensation Law.

4.1.7 No police employee shall engage in any other business, calling, or vocation, regardless how limited, without first obtaining the written

approval of the Director.

STATEMENT OF THE CASE

On February 23, 1979, Donald Carlson (hereinafter referred to as the "Respondent") filed a Complaint with Prayer for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction with the United States District Court for the District of New Hampshire. The jurisdiction of the district court was invoked pursuant to 38 U.S.C. §2[illegible]2. The pertinent facts surrounding Respondent's claim are as follows:

Respondent has been employed by the State of New Hampshire Department of Safety, Division of State Police since June 17, 1968. After approxi-

mately one year of training, Respondent became a trooper with the State Police. Respondent has had at least four different troop assignments since the commencement of his employment. On or about July 1, 1969, Respondent was assigned to Troop D, which is responsible for highway patrol and law enforcement duties in the Franklin, New Hampshire area. On or about July 19, 1974, Respondent was assigned to executive security. On February 27, 1976, Respondent was transferred to Troop G which is responsible for interstate highway patrol. On July 2, 1976, Respondent was transferred to Troop I, which is responsible for motor vehicle law enforcement.

From January 8, 1979 to February 24, 1979, Respondent took a leave of

absence to attend Basic Aircraft Loadmaster School at Sheppard Air Force Base, Texas. Respondent took another leave of absence for the same purpose from April 18, 1979 to June 7, 1979.

Since special instruction in the motor vehicle laws is required for performance of Troop I functions, Respondent's responsibilities could not be assumed by a trooper without the training or by a trooper trainee, thus increasing an already existing backlog in the work of Troop I.

Upon Respondent's return to work from the first leave of absence, the Director of State Police reassigned Respondent to Troop G. During Respondent's absence from Troop G, his responsibilities could be assumed by another trooper or trooper trainee.

The purpose of the reassignment was thus to permit Respondent to attend his military obligations with the least disruption to the functioning of the State Police.

As a trooper with Troop G, Respondent is paid at the same labor grade as he was when he was assigned to Troop I. His status, seniority, vacation, post of duty, and other rights and benefits under the New Hampshire personnel system remain the same. The only difference in Respondent's routine is the regular hours which he is required to work. While the number of hours remains the same, Respondent was required to work some evenings and weekends with Troop G while he usually worked days with Troop I.

On February 23, 1979, Respondent filed a Complaint in the District Court alleging that his transfer to Troop G upon his return from a military leave of absence violated 38 U.S.C. §2024(d). On March 20, 1979, Petitioner filed a Motion for Summary Judgment, and on April 6, 1979, Respondent filed a Cross Motion for Summary Judgment. The material facts were provided by the affidavits of the Respondent and Petitioner Knowlton and through the testimoney of Petitioner Knowlton at the hearing on both Motions which was held before Judge Shane Devine on April 11, 1979. The issues before the court required a determination of Respondent's "position" with the State Police and whether he had been restored to his "position" pursuant to 38 U.S.C.

§2024(d).

On April 13, 1979, the District Court issued an Opinion and Order holding that Respondent's position was that of trooper with the New Hampshire State Police and that he had been restored to his position with all the rights and benefits possessed by other troopers. On April 25, 1979, Plaintiff filed a Motion for Reconsideration and Alteration of Judgment Under FRCP 59(e), which was denied on May 15, 1979.

On June 14, 1979, Respondent filed a Notice of Appeal with the United States Court of Appeals for the First Circuit. In his Appeal, Respondent alleged that Petitioner's actions violated 38 U.S.C. §2024 and denied him an incident or advantage of his employment in violation of 38 U.S.C. §2021(b)(3).

Petitioners contended that no claim under §2021(b)(3) had been raised below and should not be considered for the first time on appeal.

By Order and Opinion dated November 30, 1979, the Court of Appeals held that Respondent had raised a claim below under §2021(b)(3) and that Petitioner's actions had violated that provision. The Court of Appeals found it unnecessary to decide Respondent's claim under §2024(d).

Petitioners have filed the petition for writ of certiorari seeking review and reversal of the decision of the Court of Appeals.

REASONS FOR GRANTING WRIT

1. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE COURT OF APPEALS' DECISION REGARDING AN IMPORTANT QUESTION OF FEDERAL LAW IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS

The issue in this case involves an important question of federal statutory construction which has not heretofore been addressed by this Court and which has widespread impact on employers bound by the provisions of the Veterans Readjustment Assistance Act and on the public safety. Furthermore, the decision of the Court of Appeals for the First Circuit conflicts with the decisions of other courts in similar situations arising under 38 U.S.C. §2021(b)(3), necessitating resolution by this Court.

The Court of Appeals held that

Petitioners had violated 38 U.S.C. §2021(b)(3) by denying Respondent an "incident or advantage" of his employment solely because of his reserve obligation. In so holding, the Court of Appeals found that the change in Respondent's duties and work schedule which resulted from his troop transfer constituted a denial of an incident or advantage of his employment with the New Hampshire State Police and that Respondent's transfer solely because of his military obligations was improper. The holding is erroneous for two reasons. First, it fails to examine the employment relationship in defining "incident and advantages" of employment. Secondly, it ignores the purpose of the transfer (i.e. protection of the public safety through provision for the

least disruption to the New Hampshire State Police) and assumes that the transfer was solely because of Respondent's military obligations.

The term "incident or advantage" of employment as it is used in 38 U.S.C. §2021(b)(3) is not defined by the Veterans Readjustment Assitance Act. Although this Court has not had occasion to interpret §2021(b)(3), lower courts considering claims arising under §2021(b)(3) have held that a particular benefit is or is not an incident or advantage of employment by examining the employee's employment rights as they existed prior to military service and determining whether the benefit being denied was within the scope of those rights.

In Kidder v. Eastern Air Lines,

Inc., 469 F. Supp. 1060 (S.D. Fla. 1978), the plaintiff alleged a violation of §2021(b)(3) when his employer refused to pay him for a Memorial Day holiday during which time plaintiff was performing active duty training with the National Guard. Under the applicable collective bargaining agreement, employees were entitled to holiday pay unless they were classified as being on a leave of absence on the date of the holiday. The court held that to the extent a claimed benefit of employment is an incident or advantage of employment, a National Guardsman must be treated as if he had remained at work and accorded the benefit if it is based on mere presence at work. Since the plaintiff would have been at work but for his military obligations

and therefore entitled to holiday pay, the court held the holiday pay to be an incident or advantage of employment, guaranteed by §2021(b)(3).

In Lott v. Goodyear Aerospace Corp., 395 F. Supp. 866 (N.D. Ohio 1975), the plaintiff reservist claimed a violation of §2021(b)(3) because his employer had credited him with waiving available overtime which he was unable to work because of reserve duty. Under the collective bargaining agreement, overtime was equalized, and an employee could voluntarily work and be paid for overtime unless he voluntarily chose not to do so. The court found that the opportunity to work overtime was thus an incident or advantage of plaintiff's employment, and the plaintiff could not be credited for the overtime opportunity

of which he could not take advantage.

In Monroe v. Standard Oil Company, 446 F. Supp. 616 (N.D. Ohio 1978), the court held that the plaintiff reservist who was unable to exchange work shifts for purposes of military leave and therefore unable to work the forty-hour week guaranteed by the collective bargaining agreement was entitled to recover wages for a forty-hour week, since a forty-hour week was an incident of his employment.

In each of these three cases, the courts found that the benefit being denied was an employment right to which the employees were entitled by virtue of the employment relationship as defined the parties through applicable collective bargaining agreements. The Court of Appeals' holding in the in-

stant case completely ignores the employment relationship between Petitioner and Respondent and consequently conflicts with the other cases which have addressed this issue. The court recognized that pursuant to State Police Regulation 3.5 troopers are subject to being assigned at any time "to such Bureau, Troop, or Unit as the Director [of State Police] may order, or to any other duty he may deem for the good of the service." See Appendix, pg.A-3. Furthermore, pursuant to Rule 4.1, troopers are subject to 24 hour duty. It is evident, and the Court of Appeals recognized, that state troopers have no vested right in a particular work assignment or hours of duty and that they are subject to reassignment at

the discretion of the Director. Nevertheless, the Court of Appeals specifically held:

> The fact that [Respondent] has no vested right under state law in the particular work assignment he filled prior to his military leave and was subject to being reassigned at the discretion of the Director does not alter our conclusion that §2021(b)(3) prohibits the Director from transferring [Respondent] "because of" his reserve obligation." True, the Director would be free to transfer [Respondent] at any time, including while his reserve duties were in progress, for reasons unrelated to his reserve obligations; but the Director was not free to transfer him to an assignment involving denial of a previously enjoyed incident or advantage of employment <u>for reasons causally related to the employee's reserve obligations</u>. Here there can be no doubt that the reason for the transfer was so related. (footnotes omitted) (emphasis in original). See Appendix, page A-5.

In other words, notwithstanding the fact that Respondent had no employment right

to a particular work assignment and duty hours (i.e. it was not one of the benefits of his employment), the Court of Appeals held that he had been denied an incident or advantage of his employment. The error in the Court of Appeals' holding is the conclusion that Respondent was denied an incident or advantage of his employment because he was reassigned solely due to his reserve obligation. Assuming arguendo that the reassignment was solely due to Respondent's reserve obligations, the Court of Appeals has nevertheless taken a jump that logically cannot be taken; that is, that action taken by an employer solely based on an employee's reserve obligation inevitably leads to the conclusion that the employee was denied an incident or advantage of his

employment. Such is not the case. 38 U.S.C. §2021(b)(3) does not prohibit an employer from taking any action due to an employee's participation in the military reserve. §2021(b)(3) simply assures that reservists will be entitled to the same treatment afforded their co-workers not having such military obligations. Lott v. Goodyear Aerospace Corporation, supra at 868-869. Its purpose is to protect reservists from being disadvantaged in employment merely because of their status as members of the armed services. Kidder v. Eastern Air Lines, Inc., supra at 1067.

The Respondent in this case is not being disadvantaged in his employment. His troop reassignment resulted in no loss of pay, seniority, or personnel benefits under the state personnel

system, nor does a lateral transfer from one troop to another constitute either a promotion or demotion. See Appendix, pg. A-2-3. None of the incidents or advantages of Respondent's employment with the New Hampshire State Police were affected by Petitioners' actions. The only consequence was a change in hour and duty assignment to which Respondent was subject regardless of his reserve obligations. In other words, a particular work shift or assignment is not an incident or advantage of employment as a New Hampshire State Trooper. The Court of Appeals finding to the contrary conflicts with other decisions rendered under §2021(b)(3) since it ignores the employment relationship as it is defined by the employer and employee and goes beyond the

intended purpose of §2021(b)(3). This Court should grant certiorari for the purposes of correcting the error and defining the protection afforded by 38 U.S.C. §2021(b)(3).

2. <u>THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE COURT OF APPEALS DECISION UNREASONABLY INTERFERES WITH STATE OPERATION OF ITS POLICE FORCE</u>.

Although the Veterans Readjustment Assistance Act establishes certain rights of members of the military with respect to their employment, it was never intended to redefine the employment relationship and interfere with the daily operations and objectives of employers. The decision of the Court of Appeals in this case has done just that, to the detriment of the public safety.

The evidence before the district

court demonstrated that the purpose of Respondent's troop reassignment was to permit him to comply with his military obligations with the least disruption to the functioning of the State Police. Because of the special training required to perform Troop I functions, Respondent's work could not be performed in his absence by other troopers without that training or by trooper trainees. A consequence of his absence would be an increase in the backlog of work already existing in Troop I. However, Respondent's responsibilities in Troop G, to which he was reassigned, could easily be assumed by another trooper or trooper trainee. By reassigning Respondent to Troop G, the work of the State Police would have the continuity required to protect the public safety.

By prohibiting reassignment, the Court of Appeals has interfered with that continuity and gone beyond the terms and intent of the Veterans Readjustment Assistance Act, since none of the consequences of Respondent's reassignment involve an incident or advantage of his employment with the New Hampshire State Police.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the First Circuit.

Respectfully submitted,

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A P P E N D I X

United States Court of Appeals
For the First Circuit

No. 79-1262

DONALD W. CARLSON,
PLAINTIFF, APPELLANT,
v.
NEW HAMPSHIRE DEPARTMENT OF SAFETY, ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE
[HON. SHANE DEVINE, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
CAMPBELL, *Circuit Judge*, and
BONSAL,* *Senior District Judge.*

Robert T. Clark, with whom *Linda L. Murtha* and *Cleveland, Waters and Bass* were on brief, for appellant.

Arpiar G. Saunders, Jr., Glenn G. Geiger, Jr., Stuart A. Steinberg, Robert H. Ballan, John E. Dabuliewicz, Gregory E. Gore, James P. Loring, and *Susan Bodine Mitchell* on brief for Vet Project, Inc., amicus curiae.

Steven J. McAuliffe, Assistant Attorney General, with whom *Thomas D. Rath*, Attorney General, and *Deborah J. Cooper*, Assistant Attorney General, Division of Legal Counsel, were on brief, for appellees.

November 30, 1979

CAMPBELL, *Circuit Judge.* Plaintiff, a New Hampshire State Trooper, brought an action in the district court claiming his assignment from troop I, patrol #17, to troop G, which effectuated a change in duties and work

* Of the Southern District of New York, sitting by designation.

schedule, violates the Veterans Readjustment Assistance Act, 38 U.S.C. §§ 2021-2026. The action was submitted for determination on cross-motions for summary judgment.[1] The court denied plaintiff's motion, granted defendants', and entered judgment dismissing the complaint. We reverse.

Plaintiff, who has been employed as a state trooper since 1968, is a member of the military reserves. In the summer of 1978 he informed defendant Knowlton, the director of the division of state police, that his transfer from the New Hampshire Air National Guard to the United States Air Force Reserve required him to attend two six-week training sessions. Upon his return to work after the completion of the first session, Colonel Knowlton informed him that he was transferred from troop I to troop G effective immediately. This transfer resulted in no loss of pay, seniority, or personnel benefits under the state personnel system. Plaintiff's duties and work schedule were, however, changed. I troopers, whose duties include the ap-

[1] The mere filing of cross-motions for summary judgment is not equivalent to the submission of a case for final determination on the basis of the various attachments to the motions and any other evidence presented. 10 C. Wright & A. Miller, *Federal Practice and Procedure* § 2720 at 466-67 (1973). In the latter situation, the district court may resolve material factual disputes while in the former such resolution is, of course, impermissible. *Thyssen Plastik Anger KG* v. *Induplas, Inc.*, 576 F.2d 400, 402 (1st Cir. 1978). If parties mean to submit a case on the basis of an agreed upon record, they should so state at the time and indicate either that certain facts are to be taken as true or that the court is to reach its decision on the basis of its assessment of the submitted matter. A loose use of summary judgment may result in serious confusion on appeal as to the extent of the record and the applicable scope of appellate review. Here affidavits were submitted and live testimony was presented, and the district court may have been accorded leeway to assess the credibility of the witness. However, as the cross-motions were premised on the same legal principles and relied on the same basic facts and as the parties appear to have taken the position, with which we agree, that regardless of the credibility resolution no facts material to the resolution of the contested legal issue are in dispute, the procedure used was adequate. *Compare Burke* v. *National Broadcasting Co., Inc.*, 598 F.2d 688, 689 n.1 (1st Cir.), *cert. denied*, 48 U.S.L.W. 3221 (Oct. 2, 1979) (No. 79-135).

proval of motor vehicle inspection stations and automobile dealerships, inspection of school buses, and investigation, generally work from 8:00 a.m. to 5:00 p.m. on four days and from 1:00 p.m. to 10:00 p.m. on a fifth. No weekend work is ordinarily required except on holiday weekends when I troopers may supplement the regular highway patrol. G troopers, on the other hand, are assigned to the patrol of interstate highways and work nine-hour rotating shifts which include weekends.[2]

In contrast to G troopers, whose duties may be adequately performed by trooper trainees, I troopers receive some special training to enable them to carry out their tasks. Consequently, a temporary absence from troop I occasions some inconvenience to the service for either the work must await the absentee's return, which may result in some backlog and inconvenience to operators seeking immediate inspection approvals, or else another trooper must be trained for the assignment. In an effort to minimize any disruption which might be caused by plaintiff's military leave, Colonel Knowlton had another trooper trained to fill permanently the slot plaintiff had formerly occupied in troop I and transferred plaintiff to troop G.

Pursuant to State Police Regulation 3.5, troopers are subject to being assigned at any time "to such Bureau, Troop, or Unit as the Director may order, or to any other duty he may deem for the good of the service." A lateral transfer from one troop to another officially constitutes neither a promotion nor a demotion; pay scale, seniority, vacation, and other personnel benefits are unaffected by such transfers. Plaintiff, prior to his service in troop I, had been assigned to troops G and D.

Plaintiff contends his transfer from troop I to troop G because of the absences occasioned by his military obligation violates 38 U.S.C. §§ 2024(d) and 2021(b)(3). The

[2] Plaintiff's schedule now requires him to work three out of four weekends.

first provides that a reservist away from work to attend a training period of less than three months' consecutive duration "shall be permitted to return *to such employee's position* with such seniority, *status,* pay, and vacation as such employee would have had if such employee had not been absent for [reserve duties]. . . . [emphasis added]." Plaintiff argues that his position within the meaning of § 2024(d) is specifically I trooper, not merely state trooper as defendants contend and as the district court concluded. Section 2021(b)(3) provides that a reservist such as plaintiff "shall not be denied retention in employment or any promotion *or other incident or advantage of employment* because of any obligation as a member of a Reserve component of the Armed Forces [emphasis added]." As we agree with plaintiff that the change in his duties and work schedule because of his military leave constitutes a denial of an incident or advantage of employment and that therefore plaintiff must be restored to troop I, we need not and do not reach the separate issue whether § 2024(d) was also violated.[3]

Section 2021(b)(3) is meant to preclude an employer from disadvantaging a covered employee because of his reserve obligations. We cannot say that the transfer, due to plaintiff's reserve training, from a basically 8 to 5 weekday job to one with weekend work and shifts which may fall during any hour of the day or night is not a denial

[3] Defendants argue that plaintiff referred to § 2021(b)(3) in the district court only to support his argument that the word "position" in § 2024(d) must be interpreted to mean "same job duties and hours" and that plaintiff may not for the first time on appeal argue defendants violated § 2021(b)(3). Defendants are incorrect. Plaintiff's complaint states that his action arises under 38 U.S.C. §§ 2021-2026 and plaintiff argued in his district court brief in support of his motion for summary judgment: "There is no doubt that a comparison of the position held by the plaintiff in this action before and after his military leave of absence points unalterably to a denial of an 'incident or advantage' of his employment." We think the argument was presented sufficiently below to enable plaintiff to press it on appeal.

of an incident or advantage of employment.[4] The fact that plaintiff has no vested right under state law in the particular work assignment he filled prior to his military leave and was subject to being reassigned at the discretion of the Director does not alter our conclusion that § 2021(b)(3) prohibits the Director from transferring plaintiff "because of"[5] his reserve obligation. True, the Director would be free to transfer plaintiff at any time, including while his reserve duties were in progress, for reasons unrelated to his reserve obligations; but the Director was not free to transfer him to an assignment involving denial of a previously enjoyed incident or advantage of employment *for reasons causally related to the employee's reserve obligations.* Here there can be no doubt that the reason for the transfer was so related.

Nor is it sufficient that defendants treated plaintiff as they would have treated any employee on a leave of absence. Under § 2021(b)(3) reservists are "entitled to the same treatment afforded their coworkers not having such military obligations. . . ." S. Rep. No. 1477, 90th Cong., 2d Sess., at 2, U.S. Code Cong. & Ad. News 3421 (1968). (legislative history of § 9(c)(3) of the Military Selective Service Act of 1967, a predecessor statutory provision to § 2021(b)(3)). The mandated standard of comparison is

[4] While it has been held that an employer may restore a veteran returning from active service to a different shift than he had previously worked, *Boone* v. *Fort Worth & Denver RR. Co.*, 223 F.2d 766 (5th Cir. 1955); *McCormick* v. *Carnett-Partsnett Systems, Inc.*, 396 F. Supp. 251, 254 (M.D. Fla. 1975); *Grubbs* v. *Ingalls Iron Works Co.*, 66 F. Supp. 550 (N.D. Ala. 1946), these cases were decided under statutory provisions which only require that the veteran be restored to his former position *or* to a position of like seniority, status, and pay; they are not controlling in determining the rights of a reservist under 38 U.S.C. § 2021(b)(3).

[5] We are aware of defendants' purported distinction that the reason for plaintiff's transfer was not his military obligation per se but was the needs of the service occasioned by his two six-week absences. This semantic distinction does not change the fact that but for plaintiff's reserve commitment he would not have been transferred from troop I to G.

not, as defendants would maintain, to "those coworkers away on non-military leave of absence" but to the more embrasive class of "coworkers not having [reserve] obligations." *See Lott* v. *Goodyear Aerospace Corp.*, 395 F. Supp. 866, 869-70 (N.D. Ohio 1975) (rejecting argument that predecessor provision to § 2021(b)(3) requires only that reservists be treated the same as employees furloughed for non-military reasons); *see also Monroe* v. *Standard Oil Co.*, 446 F. Supp. 616, 620 (N.D. Ohio 1978), and *Kidder* v. *Eastern Airlines, Inc.*, 469 F. Supp. 1060, 1067 (S.D. Fla. 1978) (rejecting the same argument). Defendants' restrictive interpretation of § 2021(b)(3) would be at odds with the liberal interpretation generally accorded legislation of this nature. *Alabama Power Co.* v. *Davis,* 431 U.S. 581, 584 (1977); *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

Because plaintiff was improperly transferred from troop I patrol #17 to troop G in violation of 38 U.S.C. § 2021(b)(3), he must be restored to his former work assignment. 38 U.S.C. § 2022. The judgment of the district court is vacated, and the court is directed to enter summary judgment for plaintiff.[6]

So ordered.

[6] We need not now decide to what extent an employer would ever, in truly exceptional circumstances, be justified in making a change in a reservist's work schedule because of the effect the anticipated absences would have on the employer's business. If there are circumstances where the employer's business would be so greatly disrupted by a reservist's temporary military leave that some accommodation would be in order, this is not one of them. Defendants' evidence, taken most favorably to them, would not support a finding that exceptional hardship would have occurred had not plaintiff been transferred. Whether the replacement for plaintiff was temporary, which would have been permissible, or permanent, which we have concluded is forbidden by 38 U.S.C. § 2021(b)(3), another trooper still had to be trained to perform troop I type work.

Adm. Office, U.S. Courts — Blanchard Press, Inc., Boston, Mass.

United States Court of Appeals
FOR THE FIRST CIRCUIT

No. 79-1262.

DONALD W. CARLSON,
Plaintiff, Appellant,

v.

THE NEW HAMPSHIRE DEPARTMENT OF SAFETY, ET AL.,
Defendants, Appellees.

JUDGMENT

Entered November 30, 1979

This cause came on to be heard on appeal from the United States District Court for the District of New Hampshire, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is vacated and the cause is remanded to that court to enter summary judgment for the plaintiff.

Costs to appellant.

By the Court:

/s/ DANA H. GALLUP
Clerk.

[cc: Messrs. Clark, Saunders and McAuliffe.]

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Donald W. Carlson

v. Civil No. 79-65

The New Hampshire Department of Safety and
Colonel Harold E. Knowlton, Director, Division of State Police

OPINION AND ORDER

Plaintiff, a New Hampshire State Police officer, commenced this action against defendants New Hampshire Department of Safety and Colonel Knowlton, the Director of its Division of State Police. Injunctive relief is sought pursuant to the Veterans Reemployment Rights Act (38 U.S.C. § 2021, et seq.), with jurisdiction being invoked pursuant to 38 U.S.C. § 2022. The matter came before the Court on cross motions for summary judgment, and the Court has taken testimony, heard the oral arguments of counsel, and examined the affidavits, legal memos, and pleadings on file.

Plaintiff has been a member of the New Hampshire State

Police[1] since June 17, 1968. The State Police are organized into eight troops designated by letters of the alphabet. Troops A through F are located at various geographical areas of the state where they generally perform duties of highway patrol and criminal and traffic law enforcement. Troop G is assigned to the patrol of the interstate highways, and Troop I is assigned to the approval of motor vehicle and motorcycle inspection stations and automobile dealerships, inspection of school buses, and some investigative work for the Consumer Protection Division of the Attorney General's Office. The members of Troop I are generally experienced troopers who have received special training for their work.

All troopers are rotated in duty assignments within the State Police on the basis of need.[2] Following completion of his probationary training period of one year, plaintiff was assigned for approximately four years to Troop D, followed by three years with Troop G. On July 2, 1976, he was transferred to Troop I. The members of Troops A through G serve twenty-four-

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[1]By statute (N.H. RSA 106-B) the State Police is a Division of the Department of Safety, headed by a Director (RSA 106-B:2) who holds the rank of Colonel (RSA 106-B:4). Authority is granted to the Director to make such rules and regulations as necessary for the efficient administration of the Division (RSA 106-B:7).

[2]State Police Regulation 3.5 Assignments provides in pertinent part:

> Employees will be assigned to such Bureau, Troop, or Unit as the Director may order, or to any other duty he may deem for the good of the service.

duties divided into nine hours per day with rotating shifts and work required on weekends. The members of Troop I work Monday through Friday, and in four of these five days their hours are 8 a.m. to 5 p.m. On one day per week (not a Friday) the members of Troop I work from 1 to 10 p.m. No weekend work is generally required of members of that troop, with the exception of holiday weekends, when it is necessary to supplement the regular highway patrol.

In August of 1978 plaintiff notified the Acting Director of the Department of Safety that he was transferred from the New Hampshire Air National Guard stationed at Pease Air Force Base to the United States Air Force Reserve, which is stationed at McGuire Air Force Base in New Jersey. This change in his military status required that he attend training on weekends and also that he attend two six-week schools, the first of which was scheduled to commence in January of 1979.

Plaintiff's request for a leave of absence without pay to attend the first of these military schools was initially denied by defendant Knowlton, who mistakenly assumed that military leave would be limited to fifteen days of any twelve month period with pay. Subsequent consultation with the Office of the New Hampshire Attorney General revealed the error of this assumption, and plaintiff was granted leave of absence without pay to attend his military schooling. Plaintiff returned from this assignment on February 16 and notified his employers that he would be available to return to work on

February 19, 1979. On February 20 he was advised by defendant Knowlton that he was being transferred from Troop I to Troop G, effective immediately, on the basis that the work required in Troop I could not wait for six weeks while plaintiff attended his required military schooling. An absence from Troop G for an extended period of time can be covered by a trooper trainee if necessary, but because of the experience required in Troop I, plaintiff's position was filled by an experienced trooper.

Plaintiff produced evidence to show that when he had been absent while previously assigned to Troop I he had been able to catch up with his work without need of assistance from other officers, but Knowlton also testified that occasions could arise when applications for approval of inspection stations or automobile dealerships would require the transfer of a trooper immediately because of the need of the applicant for speedy action.

The record is clear that plaintiff has lost no seniority, pay, vacation, or other benefits as the result of his transfer to Troop G. His complaint narrows to the requirement that he now works three of four weekends and must of necessity modify his schedule with Troop G from time to time to attend his weekend military training in New Jersey.[3] The specific relief

[3]The Air Force arranges air transport for the reservists on Friday evenings from Pease Air Force Base in New Hampshire to McGuire Air Force Base and returns them by the same method on Sunday evenings.

is sought pursuant to 38 U.S.C. § 2024(d), which provides in pertinent part:

> Any employee ... shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training ... such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes .... (Emphasis supplied.)

Plaintiff contends that the statutory language above emphasized requires that he must be returned to Troop I, and only Troop I, and that the defendants are barred from transferring him to any other State Police troop, even though such transfer does not affect the conditions of pay, vacation, seniority, or any other benefits. Defendants contend that inasmuch as plaintiff's position is that of "trooper", he can be transferred pursuant to the applicable regulation so long as he does not lose his right to any such benefits.

The reemployment rights of those who served in the Armed Forces were originally established by the Selective Training And Service Act of 1940 (54 Stat. 885; 50 U.S.C. App. 308). The name of this statute was changed on a number of occasions, and in 1971 it was entitled Military Selective Service Act (85 Stat. 348; 50 U.S.C. App. 459). In 1974 the reemployment provisions of the statute were recodified by the Vietnam

Veterans' Readjustment Act of 1974 (88 Stat. 1578; 38 U.S.C. § 2021, et seq.). The 1974 amendment extended coverage for the first time to employees of states and their political subdivisions.

It has been universally held that these statutes are to be construed liberally. Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946); Alabama Power Co. v. Davis, 431 U.S. 581, 584 (1977). Attempted challenges to the constitutionality of the amendment which imposed the requirements of reemployment upon the states and their subdivisions have been rejected. Jennings v. Illinois Office of Education, 589 F.2d 935 (7th Cir. 1979); Camacho v. Public Service Commission, 450 F. Supp. 231 (D.P.R. 1978); Peel v. Florida Department of Transportation, 443 F. Supp. 451 (N.D. Fla. 1977).

Plaintiff stresses that while inductees who leave a position of employment must be restored "to such position or a position of like seniority, status, and pay" (38 U.S.C. § 2021[A][B][i]), and that the same employment rights are granted to reservists ordered to initial periods of active duty of not less than three consecutive months (38 U.S.C. § 2024[c]), the language of 28 U.S.C. § 2024(d) does not permit employers of those in the position of plaintiff the exercise of such options. However, no cases have been cited, and the Court has found none which have construed the language of § 2024(d).

Plaintiff does point to 38 U.S.C. § 2021(b)(3), which forbids denial of retention in employment or any promotion "or other incident or advantage of employment" because of obligations as a reservist. While this does cast some light, as plaintiff argues, on the breadth of the statute, it is not of great assistance to the analysis we must perform because by its terms it applies to those as to whom employers have the option of offering a position of "like seniority, status, and pay".

The cases cited by plaintiff are of some assistance, although not precisely on point. In Bankston v. Stratton-Baldwin Company, 441 F. Supp. 247 (S.D. Ala. 1977), a salesman in private employment was discharged four days prior to receiving orders to report for a fifteen-day tour of duty in the Air Force Reserve. In construing 38 U.S.C. § 2021(b)(3), the court in addition to damages ordered that the salesman be restored to employment in the exact territory he held before his wrongful discharge.

Lott v. Goodyear Aerospace Corporation, 395 F. Supp. 866 (N.D. Ohio 1975) construed a predecessor statute (50 U.S.C. § 459) to prevent the "mark up" of overtime hours which plaintiff was unable to work because of his requirement of reserve weekend military duty. And in Monroe v. Standard Oil Company, 446 F. Supp. 616 (N.D. Ohio 1978), the court held that pursuant to 38 U.S.C. § 2021(b)(3) where the reservist employee was unable to exchange his shifts so that he could

work the full forty hours available, the employer would be required to either change his scheduling practices or pay the plaintiff for the time annually lost because of the inability to schedule around his reserve commitments.

We deal here, however, not with salesmen or factory employees, but with a State Trooper whose primary function is the protection of persons and property and the maintenance of law and order. Service in such employment is, or can be, arduous and requires high versatility. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 310 (1976). The choice of organization for law enforcement personnel is a decision entitled to the same sort of presumption of legislative validity as are state choices designed to promote other aims within the cognizance of the State's police power. Kelley v. Johnson, 425 U.S. 238, 247 (1976).

The record before this Court clearly demonstrates that, apart from any requirement of military service, all members of the New Hampshire State Police are subject to transfer between or among troops on the basis of need. There are no vested employment rights in the hours or type of work performed in this organization. When demonstrated need exists, all troopers must respond as a condition of their employment. It is clearly the law that the assignment of an employee to a different shift does not, standing alone, constitute a change in status. McCormick v. Carnett-Partsnett Systems, Inc., 396 F. Supp. 251 (M.D. Fla. 1975).

Accordingly, the Court finds and rules that inasmuch as plaintiff herein has suffered no loss of seniority, pay, vacation, or other benefits, his position in the New Hampshire State Police is that of trooper, whether he is assigned to Troop A, E, G, or I. Having been restored to "such position" with all of the benefits and rights possessed by other troopers, the fact that it might be somewhat more inconvenient for him to schedule his weekend training or attendance at military reserve school does not constitute any violation of the applicable statute.

For the reasons hereinabove set forth, it is ordered that the defendants' motion for summary judgment be, and it hereby is, granted, and the plaintiff's cross motion for summary judgment be, and it hereby is, denied.

SO ORDERED.

Hale Dair
United States District Judge

April 13, 1979

cc: Linda L. Murtha, Esq.
Deborah Cooper, Esq.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Donald W. Carlson

v. Civil Action No. 79-65

The New Hampshire Department of Safety and Colonel Harold E. Knowlton, Director, Division of State Police

JUDGMENT

In accordace with the OPINION and ORDER dated April 13, 1979 by the Honorable Shane Devine, United States District Judge, judgment is hereby entered.

By the Court,

William S. Berry
Clerk

April 16, 1979

cc: Linda L. Murtha, Esq.
Deborah Cooper, Esq.

38 U.S.C. §2021 Right to reemployment of inducted persons; benefits protected

(a) In the case of any person who is inducted into the Armed Forces of the United States under the Military Selective Service Act (or under any prior or subsequent corresponding law) for training and service and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such training and service, and(1) receives a certificate described in section 9(a) of the Military Selective Service Act (relating to the satisfactory completion of military service), and (2) makes application for reemployment within ninety days after such person is relieved from such training and service or from hospitalization continuing after discharge for a period

of not more than one year -

(A) if such position was in the employ of the United States Government, its territories, or possessions, or political subdivisions thereof, or the District of Columbia, such person shall-

(i) if still qualified to perform the duties of such position, be restored to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position, by reason of disability sustained during such service, but qualified to perform the duties of any other position in the employ of the employer, be offered employment and, if such person so requests, be employed in such other position the duties of which such person is qualified to perform as will provide such person like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such person's case;

(B) if such position was in the employ of a State, or political subdivision thereof, or a private employer, such person shall -

(i) if still qualified to perform the duties of such position, be restored by such employer or the employer's successor in interest to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position, by reason of disability sustained during such service, but qualified to perform the duties of any other position in

the employ of such employer or the employer's successor in interest, be offered employment and, if such person so requests, be employed by such employer or the employer's successor in interest in such other position the duties of which such person is qualified to perform as will provide such person like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such person's case.

unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so. Nothing in this chapter shall excuse noncompliance with any statute or ordinance of a State or political subdivision thereof establishing greater or additional rights or protections than the rights and

protections established pursuant to this chapter.

(b)(1) Any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section shall be considered as having been on furlough or leave of absence during such person's period of training and service in the Armed Forces, shall be so restored or reemployed without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be dis-

charged from such position without cause within one year after such restoration or reemployment.

(2) It is hereby declared to be the sense of the Congress that any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section should be so restored or reemployed in such manner as to give such person such status in the person's employment as the person would have enjoyed if such person had continued in such employment continuously from the time of such person's entering the Armed Forces until the time of such person's restoration to such employment, or reemployment.

(3) Any person who holds a position described in clause (A) or (B)

of subsection (a) of this section shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.

(c) The rights granted by subsections (a) and (b) of this section to persons who left the employ of a State or political subdivision thereof and were inducted into the Armed Forces shall not diminish any rights such persons may have pursuant to any statute or ordinance of such State or political subdivision establishing greater or additional rights or protections.

38 U.S.C. § 2024 Rights of persons who enlist or are called to active duty; Reserves

(a) Any person who, after entering the employment on the basis of which such person claims restoration or reemployment, enlists in the Armed Forces of the United States (other than in a Reserve component) shall be entitled upon release from service under honorable conditions to all of the reemployment rights and other benefits provided for by this section in the case of persons inducted under the provisions of the Military Selective Service Act (or prior or subsequent legislation providing for the involuntary induction of persons into the Armed Forces), if the total of such person's service performed between June 24, 1948, and August 1, 1961, did not exceed four

years, and the total of any service, additional or otherwise, performed by such person after August 1, 1961, does not exceed five years, and if the service in excess of four years after August 1, 1961, is at the request and for the convenience of the Federal Government (plus in each case any period of additional service imposed pursuant to law).

(b)(1) Any person who, after entering the employment on the basis of which such person claims restoration or reemployment, enters upon active duty (other than for the purpose of determining physical fitness and other than for training), whether or not voluntarily in the Armed Forces of the United States or the Public Health Service in response to an order or call

to active duty shall, upon such person's relief from active duty under honorable conditions, be entitled to all of the reemployment rights and benefits provided for by this chapter in the case of persons inducted under the provisions of the Military Selective Service Act (or prior or subsequent legislation providing for the involuntary induction of persons into the Armed Forces), if the total of such active duty performed between June 24, 1948, and August 1, 1961, did not exceed four years, and the total of any such active duty, additional or otherwise, performed after August 1, 1961, does not exceed four years (plus in each case any additional period in which such person was unable to obtain orders relieving such person from active duty).

(2) Any member of a Reserve component of the Armed Forces of the United States who voluntarily or involuntarily enters upon active duty (other than for the purpose of determining physical fitness and other than for training) or whose active duty is voluntarily or involuntarily extended during a period when the President is authorized to order units of the Ready Reserve or members of a Reserve component to active duty shall have the service limitation governing eligibility for reemployment rights under subsection (b)(1) of this section extended by such member's period of such active duty, but not to exceed that period of active duty to which the President is authorized to order units of the Ready Reserve or members of a Reserve

component. With respect to a member who voluntarily enters upon active duty or whose active duty is voluntarily extended, the provisions of this subsection shall apply only when such additional active duty is at the request and for the convenience of the Federal Government.

(c) Any member of a Reserve component of the Armed Forces of the United States who is ordered to an initial period of active duty for training of not less than three consecutive months shall, upon application for reemployment within thirty-one days after (1) such member's release from such active duty for training after satisfactory service, or (2) such member's discharge from hospitalization incident to such active duty for training, or one year

after such member's scheduled release from such training, whichever is earlier be entitled to all reemployment rights and benefits provided by this chapter for persons inducted under the provisions of the Military Selective Service Act (or prior or subsequent legislation providing for the involuntary induction of persons into the Armed Forces), except that (A) any person restored to or employed in a position in accordance with the provisions of this subsection shall not be discharged from such position without cause within six months after that restoration, and (B) no reemployment rights granted by this subsection shall entitle any person to retention, preference, or displacement rights over any veteran with a superior claim under those provisions of title

5 relating to veterans and other preference eligibles.

(d) Any employee not covered by subsection (c) of this section who holds a position described in clause (A) or (B) of section 2021(a) shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training, or upon such employee's discharge from hospitalization incident to that training, such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such

employee had not been absent for such purposes. Such employee shall report for work at the beginning of the next regularly scheduled working period after expiration of the last calendar day necessary to travel from the place of training to the place of employment following such employee's release, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control. Failure to report for work at such next regularly scheduled working period shall make the employee subject to the conduct rules of the employer pertaining to explanations and discipline with respect to absence from scheduled work. If such an employee is hospitalized incident to active duty for training or inactive duty training, such employee shall

be required to report for work at the beginning of the next regularly scheduled work period after expiration of the time necessary to travel from the place of discharge from hospitalization to the place of employment, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control, or within one year after such employee's release from active duty for training or inactive duty training, whichever is earlier. If an employee covered by this subsection is not qualified to perform the duties of such employee's position by reason of disability sustained during active duty for training or inactive duty training, but is qualified to perform the duties of any other position in the employ of the employer or such employer's successor in interest, such employee shall be offered employment and, if such person so requests, be employed by that employer or such employer's successor in interest in such other position the duties of which such employee is qualified to perform as will provide such employee like seniority status, and pay, or the nearest approximation thereof consistent with the circumstances in such employee's case.

(e) Any employee not covered by subsection (c) of this section who holds a position described in clause (A) or (B) of section 2021(a) shall be considered as having been on leave of absence during the period required to report for the purpose of being inducted into, entering, or determining, by a preinduction or other examination,

physical fitness to enter the Armed Forces. Upon such employee's rejection, upon completion of such employee's pre-induction or other examination, or upon such employee's discharge from hospitalization incident to such rejection or examination, such employee shall be permitted to return to such employee's position in accordance with the provisions of subsection (d) of this section.

(f) For the purposes of subsections (c) and (d) of this section, full-time training or other full-time duty performed by a member of the National Guard under section 316, 503, 504, or 505 of title 32, is considered active duty for training; and for the purpose of subsection (d) of this section, inactive duty training performed by that member under section 502 of title 32

or section 206, 301, 309, 402 or 1002 of title 37, is considered inactive duty training.

(g) Any member of a Reserve component of the Armed Forces of the United States who is ordered to active duty for not more than 90 days under section 673b of title 10, United States Code, whether or not voluntarily, shall be entitled to all reemployment rights and benefits provided under subsection (c) of this section for persons ordered to an initial period of active duty for training of not less than three consecutive months; and shall have the service limitation governing eligibility for reemployment rights under subsections (a) and (b)(1) of this section extended by his period of such active duty.

FILED
MAR 31 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM 1979

No. 79-1331

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF SAFETY
and
COLONEL HAROLD E. KNOWLTON, DIRECTOR
DIVISION OF STATE POLICE,
PETITIONERS,

v.

DONALD W. CARLSON,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM 1979

No. 79-1331

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF SAFETY
and
COLONEL HAROLD E. KNOWLTON, DIRECTOR
DIVISION OF STATE POLICE,
PETITIONERS,

v.

DONALD W. CARLSON,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent Donald W. Carlson respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the First Circuit's decision in this case. That decision is reported at 609 F.2d 1024.

Question Presented

Whether the transfer of a New Hampshire state tropper to a trooper position involving different duties and different hours and days of work, which transfer would not have occurred but for said trooper's training obligations as a member of the United States Air Force Reserve, denies such trooper an "incident or advantage" of employment contrary to § 2021(b)(3) of the Veterans Readjustment Assistance Act, 38 U.S.C. §§ 2021-2026?

Statement of the Case

On February 23, 1979 Donald W. Carlson filed a Complaint arising under 38 U.S.C. §§ 2021-2026 with the United States District Court in Concord, New Hampshire. The decision of the District Court (Devine, J.) dated April 13, 1979 granted Petitioners' Motion for Summary Judgment and denied Respondent's Cross Motion for Summary Judgment. Upon denial of a Motion for Rehearing, Respondent timely filed his appeal to the United States Court of Appeals for the First Circuit. The case was heard in oral argument on October 1, 1979 and a decision was rendered by the Court of Appeals (Campbell, J.) on November 30, 1979, reversing the District Court and ordering entry of summary judgment for Respondent Carlson. Petitioners filed a petition for a writ of certiorari with this Court on February 28, 1980.

The facts relevant to the issue presented for review are as follows:

Respondent is a permanent employee of the Division of State Police, New Hampshire Department of Safety and has been so employed since June 17, 1968. From July 2, 1976 until his return from military leave of absence on February 20, 1979, Respondent held a position entitled

Patrol # 17 in Troop I. Petitioner Knowlton is and was at all times material hereto the Director of the Division of State Police of the New Hampshire Department of Safety.

Respondent also is and was at all times material hereto a military reservist. In August, 1978 Respondent notified Petitioners of his transfer from the Air National Guard to the Air Force Reserve and informed them of his upcoming need for military leave of absence for two training periods, each of six weeks duration, the first of which was to commence early in 1979. After months of repeated denials of military leave by Petitioner Knowlton, permission was finally granted for this military leave of absence for six weeks, just two days before such leave was to commence. There was no backlog of work in Patrol # 17, Troop I when Respondent left for military duty on January 5, 1979. Respondent attended his active duty training session and thereafter reported to work on the next regularly scheduled work day. On the very day of his return to employment following said military leave, Respondent was told by Petitioner Knowlton that he was transferred from Troop I to Troop G. Thereafter, Respondent initiated this suit.

The United States Court of Appeals found that the job responsibilities, required training, duty hours, weekend work, nature of the work performed and duty area of Respondent's position in Troop I were vastly different from those of Respondent's position in Troop G. The court below further found that the sole reason motivating Respondent's transfer was his military obligations as a member of the United States Air Force Reserves. Finally the court below concluded that the transfer of Respondent solely because of his military obligations violated 38 U.S.C. § 2021(b)(3) and ordered that Respondent be returned to Troop I, Patrol # 17.

Reasons Why the Writ Should Be Denied

I. A Claimed Conflict Between the Decision of the Court of Appeals in This Case and One or More District Court Decisions Provides No Sound Basis for Granting the Writ.

Petitioners claim the decision below is in conflict with decisions of other courts, citing *Kidder* v. *Eastern Airlines, Inc.*, 469 F.Supp. 1060 (S.D. Fla. 1978), *Lott* v. *Goodyear Aerospace Corp.*, 395 F.Supp. 866 (N.D. Ohio 1975) and *Monroe* v. *Standard Oil Company*, 446 F.Supp. 616 (N.D. Ohio 1978). This claimed conflict, of itself, does not provide a sound basis for granting certiorari.

II. The Decision of the Court of Appeals Is Not in Conflict with the District Court Decisions Cited by Petitioners.

Petitioners claim that the narrow terms and conditions of the underlying employment relationship were determinative in *Kidder, supra, Lott, supra* and *Monroe, supra.* Careful analysis of those cases reveals that strict application of the underlying employment relationship would and did result in the denial of the claimed benefit in each case. The denied benefit was restored in each case by the District Court because those courts correctly perceived that if a benefit would be denied by the terms of the underlying employment relationship because of absence to attend military reserve obligations, then 38 U.S.C. § 2021(b)(3) would close the loop-hole. This is precisely the rationale of the Court of Appeals in this case.

III. The Decision of the Court of Appeals in This Case Is Not in Conflict with Decisions of Other Courts of Appeals Interpreting and Applying 38 U.S.C. § 2021(b)(3).

In *Carney* v. *Cummins Engine Company, Inc.*, 602 F.2d 763 (7th Cir. 1979), *cert. denied*, — U.S. —, 48 U.S.L.W. 3535 (1980), the court held that a provision of a collective bargaining agreement which denied reservists but not other employees the right to work missed overtime if they transferred departments before working such missed overtime was in violation of 38 U.S.C. § 2021(b)(3). In *West* v. *Safeway Stores, Inc.*, 609 F.2d 147 (5th Cir. 1980), the collective bargaining agreement guaranteed forty hours of work per week unless an employee was absent or tardy according to his work schedule. The court held that 38 U.S.C. § 2021(b)(3) required that the employer treat the reservist employee as constructively present on days when he had reserve obligations and ruled that the forty hour guarantee therefore had to be honored. The rationale of *Carney* and *West* is totally consistent with the rationale employed by the First Circuit in this case.

In *Monroe* v. *Standard Oil Co.*, — F.2d —, 103 L.R.R.M. 2317 (6th Cir. 1980), the Sixth Circuit reversed the decision of the Northern District of Ohio, 446 F.Supp. 616 (1978).[1] The seeming conflict created by the reversal does not provide a sound basis for granting the petition in this case for the following reasons:

A. The nature of the benefit denied Carlson is totally different from the nature of the benefit denied Monroe.

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[1] Respondent is advised that a Motion for Rehearing was filed in *Monroe* on March 7, 1980.

B. *Carlson* involves a blatant case of discrimination against an employee with reserve obligations solely because of those obligations. It is at least arguable, therefore, that the Sixth Circuit would find the *Carlson* result consistent with *Monroe,* in the same manner in which it found the *Carney* result consistent with *Monroe.* 103 L.R.R.M. at 2321.

C. The result in *Carlson* could equally well have been achieved by proper interpretation and application of 38 U.S.C. § 2024(d).

D. Assuming that the Sixth Circuit adheres to its opinion following rehearing, or denies rehearing, the *Monroe* decision is in direct conflict with the *West* decision, both cases involving the denial of precisely the same benefit.

E. The *Monroe* decision is illogical and inconsistent, creating a classic "Catch 22" requirement wherein the reservist must be present at work on days when he has reserve obligations in order to create a benefit protected by 38 U.S.C. § 2021(b)(3), which statute is designed to prevent discrimination against reservists because of their reserve obligations, the most common of which is compelled absence to attend drills.

IV. THE DECISION OF THE COURT OF APPEALS IN THIS CASE IS CONSISTENT WITH GENERAL PRINCIPLES OF CONSTRUCTION ENUNCIATED BY THIS COURT IN PRIOR DECISIONS INVOLVING THE VETERANS READJUSTMENT ASSISTANCE ACT OR ITS PREDECESSORS.

The Court of Appeals correctly rejected Petitioners' restrictive interpretation of 38 U.S.C. § 2021(b)(3) as being at odds with general principles enunciated by this Court in *Fishgold* v. *Sullivan Drydock & Repair Corp.,* 328 U.S.

275 (1946) and *Alabama Power Co.* v. *Davis,* 431 U.S. 581 (1977). Since the Court of Appeals found beyond any doubt that but for Respondent's reserve obligation he would not have been transferred, there can also be no doubt that Petitioners' restrictive interpretation would permit an employer's practice to cut down service adjustment benefits provided by Congress contrary to *Fishgold, supra,* 328 U.S. at 285, and would deny a benefit that would have accrued with reasonable certainty had the veteran been continuously employed contrary to *Alabama Power, supra,* 431 U.S. at 589. Since the Court of Appeals' decision is consistent with general principles enunciated in decisions of this Court, no occasion for review by this Court arises.

V. PETITIONERS' ARGUMENT BASED ON UNREASONABLE INTERFERENCE IS WITHOUT MERIT AS ITS FACTUAL BASIS WAS DECIDED ADVERSELY TO PETITIONERS BY THE COURT BELOW ON SUBSTANTIAL EVIDENCE AND SHOULD NOT BE HEARD AS ITS CONSTITUTIONAL BASIS WAS NOT RAISED AND PRESERVED IN THE COURT BELOW.

The Court of Appeals carefully considered and emphatically rejected the factual assertions which provide the basis for Petitioners' second argument. *Carlson, supra,* 609 F.2d at 1027 and nn. 5, 6; Appendix to Petition at A-5, A-6. This Court should not grant the petition to review these factual determinations.

Petitioners' second argument is also an attempt to have this Court determine the point at which a valid exercise of Congress' war powers unreasonably interferes with a state's police powers. While Petitioners could have raised this issue below, they did not do so. "The sole issues on appeal are whether [Petitioner] Knowlton's transfer of [Respondent] to Troop I [*sic*] violated 38 U.S.C. § 2024(d), whether [Respondent] raised a claim under 38 U.S.C.

§ 2021(b)(3), and if such a claim was raised, whether the provisions of § 2021(b)(3) have been violated." Petitioners' Brief in the Court of Appeals at 7. Since the District Court expressly stated that constitutional challenges to the application of 38 U.S.C. §§ 2021-26 to the states had been made and rejected, *Jennings* v. *Illinois Office of Education,* 589 F.2d 935 (7th Cir. 1979); *Peel* v. *Florida Department of Transportation,* 443 F.Supp. 451 (N.D. Fla. 1977), *subsequently aff'd,* 600 F.2d 1070 (5th Cir. 1979), Petitioners have failed to assert and preserve any claim based upon unreasonable interference with the police powers of The State of New Hampshire.

VI. The Petitioners' Dissatisfaction with Factual Determinations Made in the Court Below on the Basis of Substantial Evidence in the Record Provides No Basis for Granting the Petition.

At numerous points in their argument, Petitioners evince dissatisfaction with factual determinations of the court below. *E.g.,* Petition, p. 16 (failure to examine employment relationship); pp. 16-17 (purpose of transfer); pp. 24-25 (employee not disadvantaged). In each such instance, the Court of Appeals carefully weighed and considered all of the evidence presented before deciding, adversely to Petitioners, that the numerous differences in Respondent's pre and post transfer positions amounted to the denial of an incident or advantage of employment and that but for Respondent's reserve obligations he would not have been transferred. These issues, and other similar factual questions determined below upon substantial evidence, present no question suitable for review by this Court.

Conclusion

For these reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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